FILE COPY.

Office Supreme Court
FILED
DEC 17 19
JAMES H. McK

Supreme Court of the United States

OCTOBER TERM, 1903.

No. 117.

GEORGE W. CROSSMAN and HERMAN SIELCKEN,
Plaintiffs-in-Error,

against

THEODORE G. LURMAN and BENJAMIN D. WILLIAMS,
Defendants-in-Error.

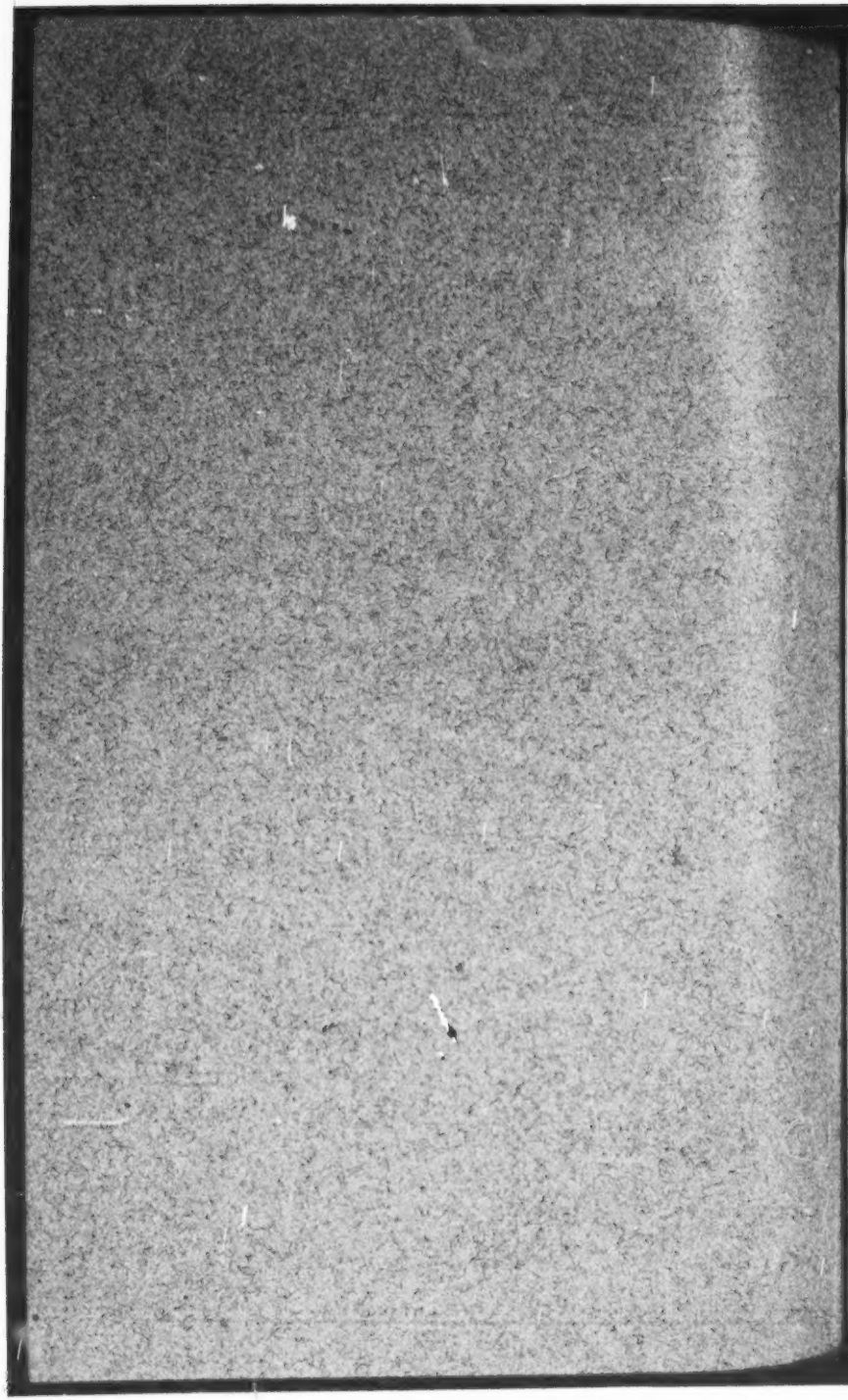
BRIEF FOR PLAINTIFFS-IN-ERROR

DILL & BALDWIN,
Solicitors for Plaintiffs-in-Error.

FREDERIC R. KELLOGG & ARTHUR J. BALDWIN,
Of Counsel.

No. 18,648.

APPEAL PRINTING CO., 14 Vesey St. TEL. 192 CORTLANDT.



APPEAL PRINTING CO., 14-16 Vesey Street, N. Y.

Supreme Court of the United States.

GEORGE W. CROSSMAN and Herman Sielcken, composing the firm of W. H. Crossman & Bro., Plaintiffs-in-Error,

against

THEODORE G. LURMAN and Benjamin D. Williams, composing the firm of Theodor G. Lurman & Co.,
Defendants-in-Error.

No. 18648.
October Term, 1903. No. 117.

BRIEF FOR PLAINTIFFS-IN-ERROR.

Statement of Facts.

This cause comes before this Court upon a writ of error to the Supreme Court of the State of New York for the First Judicial Department.

I.—NATURE OF THE ACTION.—The suit was commenced to recover damages sustained by the plaintiffs-in-error by reason of the failure of the defendants-in-error to accept certain coffees tendered to them by the plaintiffs-in-error on or about August 14th, 1894, under an executory contract entered into on July 17th, 1894.

II.—NATURE OF THE DEFENSE.—The ground upon which the defendants-in-error claimed to be justified in refusing this tender was that the coffees in question had been colored, coated, polished and powdered whereby damage was concealed and they were made to appear better than they really were and of greater value, in contravention of the provisions of the Public Health Law of New York (Laws of 1893, Ch. 661, Sec. 41, being Ch. 25 of the General Laws of the State of New York), forbidding the selling or offering for sale of adulterated foods and giving a definition to the term adulteration.

III.—THE ESSENTIAL FACTS INVOLVED.—These are as follows:

1. The plaintiffs-in-error are residents of the State of New York (See allegation of complaint, p. 4, admitted in the answer, p. 7).

2. The defendants-in-error at the same time resided and carried on their business in the State of Maryland (*id*).

3. The contract related to 500 bags of Rio coffee which were then in Rio de Janeiro and which by the terms of the contract were to be thereafter shipped at Rio de Janeiro to New York by the steamer "Catania" (p. 14).

4. The coffee was to average in grade about standards Nos. 8 and 9 of the Coffee Exchange of the City of New York (*p. 14*). *These were the lowest grades dea't in* (*p. 50*).

5. The contract further provided that the coffee on arrival should be graded by Messrs. Mackey & Small, (p. *15*) and that in the event of their grading being unsatisfactory the buyer should appoint a licensed grader, and that in the event of his average grading differing from that of the vendor, and

THE PROVISIONS OF THE STATUTE OF NEW YORK.

These are as follows:

"Sec. 41. Adulterations.—No person shall within the State manufacture, produce, compound brew, distill, have, sell or offer for sale any adulterated food or drug. An article shall be deemed to be adulterated within the meaning of this act * * * in case of food * * *

6. If it be colored or coated or polished or powdered whereby damage is concealed or it is made to appear better than it really is or of greater value." Laws of 1893, Chap. 661, Sec. 41 being Chap. 25 of the General Laws of the State of New York.

in case of their failure to agree, they should mutually select a third grader also licensed to act as arbitrator in the matter (p. *15*).

6. The reference in the contract to standard numbers 8 and 9 of the Coffee Exchange of the City of New York is to the lowest of certain grades or classes of coffees established by the Coffee Exchange, which classes are based upon certain standard samples (p. *13*).

7. Such standard samples at all times involved were coffees which were not adulterated within the meaning of the term as defined by the laws of New York (p. *12*).

8. The coffees were imported from Brazil. On or about August 14th, 1894, the steamship Catania arrived in New York carrying 500 bags of Rio coffee consigned to the plaintiffs (p. *12*). Thereafter, in the ordinary course of business, this coffee was tendered as an entirety by the plaintiffs to the defendants and was refused by them (p. *12*).

9. Thereafter, the coffee was graded by Mackey & Small, and the results were unsatisfactory to the defendants, and they thereafter appointed a licensed grader to grade the coffee and an irreconcilable difference between his gradings and those of Mackey & Small resulted (alleged in complaint p. *5* and *6*; not denied by answer).

10. Thereafter, a third licensed grader was appointed pursuant to the contract, to act as arbitrator in the matter. All samples and detailed gradings were duly submitted to him and the average grading of the coffee was duly ascertained by him (alleged in complaint p. 7; not denied in answer).

11. Upon the grading by the arbitrator, it was duly found that the said coffee averaged in grade about standard numbers 8 and 9 of the Coffee Ex-

change of the City of New York, that the average quality of the coffee was in all respects as called for by the terms of the contract, and that the coffee and each and every part thereof was a good delivery under the terms of the contract, and that the sale price thereof, upon the basis provided by the contract, was $9,269.80 (alleged in complaint, p. 7, and not denied in the answer).

12. After the refusal of the defendants to accept the coffee it was duly sold at public auction, and a net loss of $1,300.80 resulted (alleged in complaint p. 8; not denied in the answer).

13. Thereupon this suit was commenced for the purpose of reimbursing the plaintiffs for the damages thus sustained, and in the defendant's answer they seek to escape liability solely upon the ground of the alleged adulteration under the New York Statute.

14. It is conceded by the plaintiffs that about 2-5 of the coffee tendered had upon it foreign coloring matter, but such matter was not added by the plaintiffs, who themselves imported the goods from Brazil under a similar contract.

And it must be kept in mind, that *there is not even a claim on the part of the defendants that this coloring matter was in the least degree deleterious to the health of the consumer* (p. 88).

15. *And it is furthermore clear that no deception was practiced or attempted to be practised upon the purchaser.* The coffees were sold, not as high grade goods, but as the lowest grade coffees dealt in, and at the regular price for low grade coffees; and the purchaser nowhere claims to have been for an instant deceived by their appearance. *That they were of the grade contracted for is settled by the arbitration.*

IV.—THE PREVIOUS PROCEEDINGS.—This action has been tried three times in the lower courts.

The first time the plaintiffs were successful, but the judgment was reversed on the appeal to the Appellate Division of the N. Y. Supreme Court, First Department.

The second time the defendants were successful but the judgment also was reversed upon the plaintiffs' appeal.

The third time the defendants were again successful and the judgment in their favor has been affirmed by the Appellate Division and by the Court of Appeals of the State of New York.

V. THE ASSIGNMENTS OF ERROR ARE AS FOLLOWS:

I. That the Supreme Court of the State of New York at the trial of the issues between the plaintiffs-in-error and defendants-in-error herein, erroneously permitted said defendants-in-error to rely for their defence upon the provisions of Ch. 661 of the Laws of 1893 of New York.

II. That the said Court at the trial of the said issues erroneously refused to permit counsel for plaintiffs-in-error to ask, for the purpose of showing that there was an established interstate and foreign trade and commerce in coffees colored as were those in question and adulterated within the meaning of the provisions of the said statute of New York, Ch. 661 of the Laws of 1893, the following questions of the witness Theodor G. Lurman (p. 60):

Q. Mr. Lurman, did you previously to this controversy with Crossman deal in adulterated or colored coffees?

> Mr. Fox: I submit that it is irrelevant, not rebuttal and nothing whatever to do with this case.

Objection sustained. Exception taken (p. 60).

Q. I should also like to ask for the purpose of having it upon the record, whether previous to this transaction six years ago, you had powdering, polishing or covering of coffees taken place or done at that time?

Mr. Fox: Objection.

Objection sustained. Exception taken (p. 60).

III. That the said Trial Court committed like error in sustaining the objection of counsel for defendants-in-error to the following question asked during the examination of the witness Columbus O'Donnell Lee:

Q. Is it a fact that previous to the time that this controversy arose, polished and colored coffees were regularly in demand in certain parts of the United States?

Mr. Fox: I object to that as not relevant and not rebuttal.

Objection sustained. Exception taken (p. 65).

IV. That the said Trial Court committed like error in sustaining the objection of counsel for defendants-in-error to the following offer in evidence made by counsel for plaintiffs-in-error of the testimony of the defendant Theodor G. Lurman, given at a former trial:

Mr. Kellogg: I also offer in evidence the entire testimony of the defendant Lurman, from the stenographer's minutes in the first record, being that on pages 117 to 158 inclusive.

Testimony indicated marked plaintiff's

Exhibit Z for identification, printed on p. 117 *et seq.*

Mr. Fox: I object to the Court receiving an offer in that general form of forty-one pages of testimony. The Court cannot rule upon forty-one pages of testimony.

Mr. Kellogg: If your Honor does not think it admissible as an entirety, I shall offer certain parts of it. I offer it first as an entirety. Your Honor does not think it proper. It is of similar purport as the other testimony I have offered.

Mr. Fox: With that statement I am content.

Objection sustained. Exception taken by counsel for the plaintiffs.

Mr. Kellogg: I offer in evidence part of Mr. Lurman's testimony beginning at the bottom of page 152 and extending—

Mr. Fox: Why didn't you ask them when you had Mr. Lurman on the stand?

Mr. Kellogg: I asked them all and they were ruled out. I now offer them as admissions made by him on a preceding trial and they have been admitted without objection.

Mr. Fox: I object to that as irrelevant. My friend says you have ruled it out and I think you have. I object to it as irrelevant and not rebuttal.

The Court: Objection sustained and exception.

Testimony indicated marked Plaintiffs' Exhibit W W for identification, printed on p. 103.

The testimony excluded by the above rulings is as follows:

Q. Did your firm during this period which you were with it deal in polished or colored coffees? A. A portion of the time we dealt in them.

Q. What portion of the time? A. We did not deal in colored coffees after this controversy arose (p. 105).

* * * * * *

Q. Have you had much coffee polished? A. We have had some coffee polished, I cannot say how much.

Q. Much of it, a considerable quantity? A. Extending over the period of my connection with the firm there was more or less polished.

Q. A considerable quantity, wasn't it? A. Not of late years.

Q. Well, before late years—before the controversy arose? A. I do not date the time of the decline in our sales of polished coffees from the date of this controversy because the date of the decline in polished coffee I think was probably prior to that.

Q. What do you mean by decline in polished coffee? A. I mean when there was not the same demand for polished coffee; that is, that there was fifteen years ago or ten years ago.

Q. Not the same demand? A. No, sir.

Q. Do you think the realization of the sin of selling polished coffees was brought about by the lack of demand in any degree, Mr. Williams? A. What is that?

Q. Do you think the decline of the demand for polished coffees accounts at all for your sudden realization of the fact that it was sinful to do business in it? A. No, sir, I cannot say that I do.

Q. Can you say that you do not? A. I can say, as I have said before, in my judgment the decline in polished coffees dates prior to 1894.

Q. Since that time you have ceased handling polished coffees? A. We have ceased handling polished coffees.

Q. Was there a decline in the demand for colored coffees? A. I cannot say, because we were not handling them.

Q. But you had handled them before that time, had you not? A. We had to a limited extent.

Q. Had there been prior to that time, any decline in the general demand for polished, coated or manipulated coffees? A. I think there had.

Q. I wish you would tell me to your best recollection which portion of your general business prior to this controversy was in polished or colored coffee; that is, in a geenral way? A. I could not assume to tell you what percentage, but a very small percentage (pp. 107-108).

* * * * * *

Q. At times you have dealt in artificially colored coffees? A. I have.

Q. To what extent? A. To a very limited extent.

Q. What has been your method and what has been the forms of your contracts in dealing in artificially colored coffees? A. When I have furnished any artificially colored coffee it has been sold on sample (p. 119).

* * * * * *

Q. With regard to such colored coffees, has your firm handled polished coffees during that period, prior to this controversy? A. Yes, sir.

Q. To what extent? A. To a very limited extent.

Q. In what trade? A. In the southern trade.

Q. And southwestern trade? A. Yes, sir (pp. 123-124).

* * * * * *

Q. I did not ask you about that. If you had thought before that this was deception upon the consumer, why did you not discontinue it before? A. I had discontinued it at times.

Q. Why did you take it up again, if so? A. Because customers demanded it.

Q. Did the consumer demand it of you? A. No.

Q. Then it was deception to the consumer in one case, it was just as much deception in another ir-

respective of what the consumer wanted? A. I sold it to the wholesale dealer.

Q. But you knew it was going into consumption? A. I did.

Q. You know if it was deception to the consumer in one case it would be just as much deception in another whatever your own customer might have demanded from you? A. I realized that and shut down on the whole thing.

Q. After having done it for ten years? A. Not ten years.

Q. How long? A. There were periods when I did not sell any colored coffees at all.

Q. Then you took it up again? A. When they demanded it.

Q. When who demanded it? A. Customers.

Q. Not the consumers? A. No (p. 137).

V. That the said Supreme Court of the State of New York erred in overruling and denying the motion made by counsel for plaintiffs-in-error at the close of the testimony and before the charge to the jury for a direction of a verdict for the plaintiff upon the following ground:

"Third. That the statute itself (Ch. 661, Laws of 1893, of New York) so far as it is now attempted to be applied to goods from a foreign country, and which come within the operation of the United States laws, and which were in the original package, so far as this contract is concerned, it appears by the stipulation and the evidence is unconstitutional and therefore inoperative.

Motion to direct a verdict denied.

Exception taken by counsel for the plaintiffs upon each ground of the motion (pp. 83, 84).

VI. That the Supreme Court of the State of New York erroneously held for valid a certain statute of the State of New York, the same being Ch. 661

of the Laws of 1893, which said statute is a regulation of commerce with foreign nations and among the States and is repugnant to Article I, Sec. 8, Ch. 3 of the Constitution of the United States.

VII. That the Court of Appeals of the State of New York and the Appellate Division of the Supreme Court of the First Department of said State, erroneously held the said statute to be a valid exercise of the police power of the State and upon this ground erroneously affirmed the judgment of said Trial Court.

VIII. That it was error on the part of the said Supreme Court, the Appellate Division and the Court of Appeals of the State of New York, to apply the said statute to this case for the reason that said statute in this application prohibited the sale of coffee, which is an article of interstate and foreign commerce, and which in this instance was imported from a foreign country, Brazil, in contravention of the third clause of the sixth section of Article I of the Constitution of the United States.

IX. That the said Courts of the State of New York erroneously applied the provisions of said statute to the facts in this case, since said statute is repugnant to the act of Congress, Laws of 1890, Ch. 839.

VI. THE QUESTIONS TO BE RAISED UPON THIS WRIT OF ERROR.

The propositions which the plaintiffs-in-error now desire to urge upon this Court in connection with the foregoing assignments of error are the following:

1. That the State statute quoted, so far as it is sought to affect a contract between citizens of the State of New York as sellers and citizens of another State (to wit: Maryland) as buyers, and re-

lating to goods which at the time of the contract were located in the Republic of Brazil, and which pursuant to the contract were to be imported into the United States, is unconstitutional as interference with foreign and interstate commerce, and cannot be defended as an exercise of the police power of the State of New York.

2. That the plaintiffs-in-error were deprived of a constitutional right in that they were not allowed to show among other things, that the coffees in question were imported for the purpose of being re-sold in the Southern and Southwestern States of this country and not in the State of New York, and that therefore the police power of the State of New York could have no proper operation with regard to such coffees.

3. That the plaintiffs-in-error were deprived of a constitutional right in not being allowed to show that colored coffees precisely like those in question had been for a large number of years, established and recognized commercial articles in various portions of the United States other than the State of New York, and that, therefore, the statute in question as applied to deliveries of such coffees in the original packages in which they were imported into the United States, and to non-residents of the State of New York was unconstitutional and void.

4. That the goods in question, even in the light of the jury's verdict, are not such improper articles as to be deprived of the protection afforded by the Constitution of the United States to articles of commerce.

5. That as Congress has in the exercise of its power enacted legislation as to the importation of adulterated foods pursuant to the terms of which the coffees in question were not adulterated and were properly imported into the United States,

and as these coffees had been inspected and admitted into the United States by the United States officials, a State statute in effect prohibiting the delivery of such coffees in the original packages in which they were imported is unconstitutional and void.

These points will be considered separately.

POINT I.

The State statute quoted so far as it is sought to affect a contract between citizens of the State of New York as sellers and citizens of another State (to wit, Maryland), as buyers, and relating to goods which at the time of the contract were located in the Republic of Brazil, and which pursuant to the contract were to be imported into the United States, is unconstitutional as interference with foreign and interstate commerce, and cannot be defended as an exercise of the police power of the State of New York.

This point is raised under the assignments of error numbered I, V, VI, VII, VIII, and IX (p. 169-173).

The Court will keep in mind the following facts:

1. That the coffees at the time of the making of the contract were in the Republic of Brazil and were by the terms of the contract to be imported into the United States upon the steamship Catania (p. 14).

2. That the plaintiffs at the time of the con-

tract were residents of and doing business in the State of New York (p. 4).

3. That the defendants at all these times resided and carried on their business in the State of Maryland (p. 4).

4. That the memorandum of contract signed by the brokers was accepted by the defendants (p. 15) the point of which is that the place where the contract was thus accepted was presumably the State of Maryland, where the defendants resided and carried on their business.

5. That the contract called for the delivery to the defendants of the identical bags of coffee thus imported into the United States—500 bags Rio coffee to be shipped at Rio—that is to say, that it was an original package contract (p. 14). The question as to whether it was an original package contract or not is, however, of no great materiality here, inasmuch as the contract was not to sell goods already imported, but was to *import these identical coffees*.

From these facts, it appears that there never was an instant of time at which these coffees became a part of the general bulk of merchandise of the State of New York.

Prior to the contract they were in the Republic of Brazil.

And by the contract itself they were to be imported into the United States of America for delivery, not to any citizen of the State of New York but to residents of an *entirely different jurisdiction*, with whose affairs the State of New York had nothing whatever to do.

It is therefore seen that this statute as construed by the highest Court of New York purports to permit a citizen of another State to refuse to accept a

delivery of goods imported into the United States from a foreign country and in their original packages, which goods have been passed by the United States officials at the port of New York and which goods have been arbitrated upon by the grader of the New York Coffee Exchange named in the original contract, and have been found to be a good delivery under the terms of the agreement.

The argument upon which this operation of the statute is defended is based upon the decision in *Plumley v. Mass.* (155 U. S., 461), and similar cases, in which this Court reiterated the well-settled rule that the constitutional protection of foreign and interstate commerce does not apply to articles which the State in the exercise of its police power for the protection of its citizens has properly declared not to be legitimate articles of commerce at all.

It is, however, submitted that this doctrine, which we do not in the least question, has no proper application to the present case for the following reasons:

1. The universally recognized basis of the police power of a State is the right to protect the health, morals, safety and property of *its* citizens.

License cases, 5 How., 504.
Sherlock v. Alling, 93 U. S., 103.
Robbins v. Taxing District, 120 U. S., 489.
Smith v. Alabama, 124 U. S., 476.
Bowman v. R. R., 125 U. S., 465.
Dent v. West Virginia, 129 U. S., 114-122.
Brimmer v. Rebman, 138 U. S., 282.
Crutcher v. Com. of Kentucky, 141 U. S., 47.
United States v. Knight, 156 U. S., 1.
West. Union S. Co. v. James, 162 U. S., 653.

Hennington v. Georgia, 163 U. S., 299.
Schollenberger, v. Penn., 171 U. S., 1-24.
Railroad v. Ohio, 173 U. S., 285.

"Any regulation of the subject (*i. e.*, commerce) by the States, except in matters of *local* concern only, is repugnant to such freedom."

Robbins v. Taxing District, *supra*.

"The validity of the statute is based upon the general power of the State to enact such laws in relation to persons and property *within its borders* as may promote the public health, the public morals, and the general prosperity and safety of *its* inhabitants."

Western Union T. Co. v. James (*supra*).

"These decisions rest upon the undoubted right of the States of the Union to control *their purely internal affairs*" (*Leisy v. Hardin*, 135 U. S., 122).

"All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. *They are self-defensive.*" *Re Sanders*, 52 F. R., 807.

The foregoing authorities contain over and over again the same principle either expressly repeated or everywhere assumed; and in no case of which we are cognizant is there any intimation that this power may be exercised by one State *with reference to matters affecting not its own citizens but those of some other jurisdiction*.

2. The principle is recognized in the utmost fullness in the *Plumley* case itself. Thus the Court said:

"It is within the power of a State to exclude from *its* markets any compound manufactured in another State which has been artificially colored or adulterated so as to cause

it to look like an article of food in general use" (p. 478).

"The Court should not strike down a legislative enactment of a State—especially if it has direct connection with the social order, the health and the morals of *its* people" (p. 479).

In two other places not on page 479, *the Court* speaks of the power of the States to protect *their* people and *its* people.

On looking at the facts in the *Plumley* case it is at once seen that the goods then in question had at the time of the sale been *previously brought* into the State of Massachusetts, and were not imported there pursuant to any contract which was involved in the suit; and furthermore that after thus being imported they were re-sold in the State by the plaintiff-in-error, and that there was no claim that the re-sale had been made to a citizen of a jurisdiction other than that of Massachusetts itself.

3. In the same line of thought it is universally accepted as the law that not only is this police power based upon the right of the State to protect *its own* citizens in matters of purely local concern, but further that the exercise of this power is limited *by the necessity* which exists for such protection.

"What that power (to wit, police power) is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of *domestic* order,, morals, health and safety. * * * While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property within *its* borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c., from entering the State; while for the purpose of *self-protection* it may establish quarantine and reasonable inspection

laws, *it may not interfere with transportation into or through the State beyond what is absolutely necessary for its self-protection.* * * * In coming to such a conclusion we have not overlooked the decisions of very respectable Courts in Illinois, where statutes similar to the one we have before us have been sustained (Yeazel v. Alexander, 58 Ill., 254). Regarding the statutes as mere police regulations, intended to protect *domestic* cattle against infectious disease those Courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether therefore the statutes were not something more than the exertions of police power. That inquiry, they have said, was for the Legislature and not for the Courts. *With this we cannot concur.* The police power of a State cannot obstruct foreign commerce or interstate commerce *beyond the necessity for its exercise, and under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution.* And as its range comes very near to the field committed by the Constitution to Congress it is the duty of the Courts to guard vigilantly against any needless intrusion."

Hannibal R. R. v. Husen, 95 U. S., 465.
Mo. R. R. v. Haber, 169 U. S., 628-9.

"Any regulation of the subject (*i. e.*, interstate commerce) by the States *except in matters of local concern only* is repugnant to such freedom."

Walling v. Michigan, 116 U. S., 446.

Applying these principles to the present case, we ask the Court where can be found in the record any fact or thing *affecting in any degree the people of the State of New York*, or any question of local concern?

We believe that no such situation exists for the following reasons:

1. The design of the statute as construed by the Court of Appeals of New York is to prevent fraud and deception in the sale of articles of commerce (p. 166).

2. But the only fraud and deception with which the State of New York is concerned (arising out of contracts relating to property which was produced in a different country), is fraud and deception practiced *upon the people of the State of New York.*

3. And in this case we find that the contract in question involves no such point, but is made with *citizens of Maryland*, was presumably accepted by them in Maryland, that the goods when tendered were rejected by them by telegrams and letters sent from their place of business in Maryland (pp. 97-100) and that the entire matter instead of being one of local concern or one affecting the rights or safety of the people of the State of New York is purely extraterritorial and over which, it is submitted, the State of New York can exercise no jurisdiction.

4. Nor is this argument affected, we submit, by the fact that under the terms of the contract the property was to be imported into the State of New York and was physically in this State at the time when the tender was made.

For the Court will keep in mind that there is *no claim that the mere physical condition of this coffee was such as to endanger in the faintest degree the health, safety or rights of any citizen of the State of New York.*

This is not a case where the merchandise is infected so that a contagious disease might be spread either to people or to animals from its mere presence here. *It is not a case even of merchandise which is deleterious to the health of the person who consumes it.*

The sole and only basis for the attempted exer-

cise of the police power is the prevention of fraud and deception *to the person who buys;* and if as in the case at bar, the only person thus affected is a person with whom and for whom the State of New York has no concern, and if the goods in question, as is the case here, are imported from a foreign country to be delivered to a non-citizen in the original packages in which they were imported, it is submitted that the only possible basis for the exercise of the police power is shown to have no existence in fact.

The question involved, is, we submit, far reaching. The port of New York has been aptly termed the "country's mouth," receiving as it does the products of every country and every clime for distribution not merely among the citizens of the State of New York, but among the citizens of every hamlet in the United States of America.

Undoubtedly so far as the goods thus imported may be dangerous to the peace, happiness or safety of the citizens of New York, that State has a right to pass regulations regarding their introduction.

But this power must have a limit somewhere; *and we submit that it ceases to operate at the moment when the rights involved cease to be those of its non-citizens.*

If this point be attempted to be answered by the claim that the record does not show but that the defendant, although a non-resident, may have intended to resell this coffee in the State of New York and to its citizens, it then remains to call the Court's attention to the point that any possible claim of this nature would have been obviated by the evidence which was excluded by the Court below, and that such exclusion tended to deprive us of our constitutional rights.

POINT II.

The plaintiffs-in-error were deprived of a constitutional right in that they were not allowed to show among other things that the coffees in question were imported for the purpose of being resold in the Southern and Southwestern States of this country and not in the State of New York, and that therefore the police power of the State of New York could have no proper operation with regard to such coffees.

This point is raised by the assignments of error numbered II, III, IV (pp. 69, 170).

In the portions of the records therein alluded to, plaintiff's counsel sought to introduce both by direct testimony and by the admissions given upon the former trial by the defendants-in-error all of the facts relative to the nature and existence of the trade in and demand for colored coffees such as the ones in suit, and among other things as to the portions and States of the country from which this demand arose and in which it was intended to dispose of the coffees in question.

The entire line of testimony was objected to at the beginning of these inquiries (p. 60).

As the Court had ruled expressly that it would allow no evidence to be introduced except that relative to the actual condition of the coffees themselves as related to the statute (pp. 53, 55), and as this ruling covered the entire ground which plaintiffs sought to cover, it was of course unnecessary to occupy the time of the Court by more detailed inquiries than those which had been excluded.

It however appears even from the admissions made upon the preceding trial and excluded upon

this one, that this demand was limited to the southern and southwestern trade (p. 124).

And if the Court had permitted us, it was our intention and object to show at the last trial of the case not only these facts—which by themselves are ample to demonstrate that the consumption of these coffees was of no concern to the people of the State of New York—but to go into further details which would demonstrate this point beyond any possibility of argument.

If our preceding proposition is correct, to the effect that the State of New York has the right to legislate in matters only of purely local concern, and if upon the facts actually shown in the record, there could be any possible remaining question as to whether the matter was one of purely local concern, it is submitted that such doubt would have been entirely placed at rest by the evidence excluded, and that therefore its exclusion tended to deprive us of our right to atack the constitutionality of the statue as applicable to the case at bar.

If it be urged that the intent of the purchaser be immaterial, under the doctrine of *U. S. v. Knight* (*supra*), it need only be observed that this claim, if successful, *will of itself shut the defendant in error out of Court*, as it will leave the entire transaction to be adjudicated upon the facts contained in the record alone, as upon these facts the matter was certainly one outside of the jurisdiction of the State of New York.

POINT III.

The plaintiffs-in-error were deprived of a constitutional right in not being allowed to show that colored coffees precisely like those in question had been for a large number of years, established and recognized commercial articles in various portions of the United States other than the State of New York, and that therefore the statute in question as applied to deliveries of such coffees in the original packages in which they were imported into the United States and to non-residents of the State of New York was unconstitutional and void.

This point is raised by the assignments of error numbered II, III and IV, (pp. 169 and 170).

In the preceding portions of this brief we have assumed for the sake of argument that the merchandise here in question was of the class alluded to by the Court in the *Plumley* case as articles which are not legitimately the subject of commerce and dealings in which therefore would not be protected by the United States constitution if matters of local police regulation by the States were involved.

It is, however, clear that in cases of this description a party is always entitled to show if possible that the subject matter of the case, instead of being contraband, is as a matter of fact a legitimate and well-known article of commerce.

> "The first question to be considered is whether oleomargarine is an article of commerce."
>
> *Schollenberger v. Penn.*, 171 U. S., at p. 7.

At the trial below the plaintiffs-in-error sought to place upon the record all of the facts relative to the duration, existence, extent and nature of the demand for and trade in, coffees of the description of those involved in this case.

This evidence was sought to be brought out directly from the lips of the defendants themselves and also by showing their admissions on the previous trial; and as appears at p. 171, if the evidence even of the prior admissions had been admitted, we would have shown that there had been a demand for exactly this kind of coffee for upwards of 10 or 15 years prior to the trial, and that the defendants' firm had handled them during that period to a certain extent. It was the intention of the plaintiffs-in-error not merely to repeat as evidence what had been given before *but to go more in detail into the extent of this demand* and to show that the real reason for coloring coffees was the same as that which impels consumers of butter in certain sections of the country to prefer that it be colored yellow before they will purchase it.

The evidence which it was proposed to elicit would have certainly tended to show that instead of the coffees in question being treated for purposes of deception, they were treated for another and entirely different purpose, pursuant to a definite preexisting demand for and trade in, coffees of precisely that nature and with precisely the same artificial coloring; and that these coffees thus demanded for these reasons and thus traded in for a long period of years prior to this controversy had become a well-known and established article of commerce in other States than the State of New York, in which trade the State of New York had no reason to interfere for the protection of its own citizens and over which it had no jurisdiction or control.

For these reasons the exclusion of this testimony tended to deprive us of our right to attack the constitutionality of the statute as one interfering with foreign and interstate commerce in a well-known article of merchandise and in the original packages in which it was imported, and therefore, we submit, constitutes reversible error.

POINT IV.

The goods in question, even in the light of the jury's verdict, are not such improper articles as to be deprived of the protection afforded by the Constitution of the United States to articles of commerce.

In the preceding portion of our argument we have considered the case as though the verdict of the jury established that the goods in question were, like those in the Plumley case, "contraband of commerce," and were thus removed entirely from the protection of the United States Constitution and left solely to the mercy of the State police power.

We believe that even upon such an assumption the statute in question was unconstitutional for the grounds already stated.

But we also believe that the facts permit us to go deeper in the case at bar and to establish the claim set forth at the commencement of this subdivision of the brief.

Premising our remarks by the statement that if we are correct in this regard, it would, we think, certainly follow that under the guise of its police power the State could not prevent the sale of these goods in New York in the original packages in which they were imported (*Schollenberger v. Pa.*, 171 U. S., at p. 28. See *Hornblank v. Lagarle*,

60 F. R., 191 and cases cited); we call the attention of the Court to the following facts:

1. No claim whatsoever is made that the goods in question were deleterious to health (p. 88).

2. It is uncontradicted that a portion of these goods had upon them an artificial coloring matter, but that this coloring matter was not placed upon them by the plaintiffs or at their instigation, as the goods were tendered as imported from Brazil.

3. It is uncontradicted that the goods in question were coffees of certain of the merchantable grades recognized by the New York Coffee Exchange, and were sold as *coffees* and not as articles of a different nature, as was done in the *Plumley* case where oleomargarine was sold as butter.

4. Moreover, it is uncontradicted that the goods in question were of the *very lowest grades* of coffees recognized by the Coffee Exchange.

The contract called for "Standard Nos. 8 and 9" (p. 14), and the stipulation shows that only nine grades are dealt in under the New York Coffee Exchange standards (p. 13).

5. Again, we particularly call the attention of the Court to the fact that these coffees, however they may have been treated, and howsoever their natural appearance may have been altered, *were not attempted to be sold or delivered as being of any higher grade than* their true grade.

The arbitration alleged in the complaint and admitted in the answer settles conclusively the fact that the coffees in question *were of the contract grade;* that is to say, that they were within the standard numbers specified in the agreement. And the presence of the coloring matter did not prevent the coffees from being of the contract grades, for it was seen by the arbitrator (p. 66), and never-

theless the coffee is conceded by the answer to have been found up to contract.

And the price at which they were sold was the ordinary price of goods of this description, dependent for its exact ascertainment on the findings of the arbitrators (See contract, page 15, and stipulation, page 13).

6. Again, there is no claim anywhere in the record that the treatment of the coffees deceived the defendants for an instant as to the real grade of the goods. On the contrary, Mr. Lurman, admits, although he attempts to qualify it, that as soon as he examined the sample he saw that the coffees were of a low grade and were No. nines (p. 51). This is conclusively shown by the correspondence (pp. 98-100), and by the defendants seventh request to charge (pp. 93, 88).

It may be observed here that the contract itself places any question of deception *beyond the bounds of possibility*, for all questions that might arise between the parties were to be decided by expert arbitrators, and in this case were actually so decided, *and the decision was that the goods in question were exactly what the contract called for.*

7. Moreover, as we have already pointed out, had we been allowed to introduce the evidence which we offered, it would have appeared that goods of precisely this description, treated in this manner, were at the time well-known articles of commerce which had been long dealt in and which were thus dealt in pursuant to a definite demand for such articles from a particular part of the country, and that that particular part of the country had nothing to do with New York State.

Since this case contains no claim of damage to the health of any community whatsoever arising from the treatment to which these coffees were sub-

jected, it follows that the articles in question can only be considered as "contraband of commerce," if at all, upon the ground of fraud or deception committed or about to be committed—if not upon the people of the State of New York, at least upon somebody, somewhere.

But upon what grounds can such a claim of fraud be supported?

There can be no fraud without injury, either actual, or at least, probable.

So far as the *defendants* are concerned it is uncontradicted that they are not injured nor was any injury attempted to be perpetrated upon them. The goods were sold as being of the lowest grade of coffee. They were as a matter of fact, of the grades called for by the contract. They were sold at the price, not of higher grades but of these lower grades, and the defendants themselves knew from the very beginning just what they were. So far as they are concerned there was manifestly no fraud whatsoever nor could there be any fraud under such circumstances.

If then the theory of fraud be adopted as a sufficient basis for the exclusion of these articles from the ordinary protection afforded to commercial merchandise, it must be upon the hypothesis that some *persons other than the vendees* in this case were shown to be either actually defrauded or to be in danger of being defrauded by permitting this merchandise to enter general circulation.

We have already shown that the people of New York, for whose interests alone the Legislature of New York has power to act, have no interest whatsoever in this proposition or in this decision.

But even if it could be held that the statute can be supported upon the ground of protecting the interests of the citizens of other States—*where, we*

respectfully ask, is there in this record any evidence of such actual or contemplated or probable fraud upon those persons as would give the Legislature of the State of New York *or any legislature,* the jurisdiction to declare that the articles themselves are inherently non-commercial articles?

There is only, we submit, one possible theory upon which such a claim could be based; and that is, the possible danger that these low grade coffees thus treated might possibly be attempted to be resold by these defendants or by some one who might purchase from these defendants, *as high grade coffees* and at the price of high grade coffees, which, it will be claimed, they have been made to resemble by reason of the treatment to which they were subjected.

Now the *only ground* upon which such an assumption can rest is the *mere fact that the jury have found that the coffees have been made to look better than they really are or of greater value or that the damage in them has been concealed.*

But this fact alone cannot empower the legislature to say that the goods are so inherently fraudulent as to be absolutely contraband of commerce.

For there is not a scintilla of evidence that anybody, wheresoever located, has ever been in the habit of palming goods of this quality off on an unsuspecting public at a higher price than was warranted by their real value or as being better coffees than they really were or as being articles of an entirely different description than coffee itself.

Note here the essential difference between this case and the *Plumley* case. In the *Plumley* case oleomargarine was offered for sale in such a matter as to look exactly like butter and as to lead the public to believe that it was butter, without any explanation of its real nature, and it was held that *such*

a sale actually made was the proper basis for a prosecution under the statute.

But here there is not the least evidence of any such actual transaction or attempted transaction. The only transaction which is in evidence is the one between the plaintiffs and the defendants; and so far as this transaction is concerned it is absolutely and unequivocally above board in every particular. Nobody was deceived. No attempt was made to deceive, and the very contract itself made deception impossible.

The Court then, must, in the absence of any evidence upon the point, in order to apply the *Plumley* decision assume that in the future somebody else than the parties to this suit will certainly or probably attempt to use these articles for purposes of deception.

And the essential point in any such assumption in order that fraud may be held to exist, is not merely that somebody might think that these goods in question were better than they really were because of the concealment of damage, &c., *but the further assumption that the person who dealt in these goods would naturally or probably attempt to sell them as being, not merely, of their actual grade, but goods of a higher and superior grade and at the price, not of the low grade, but of such superior grades.*

Let us look for a moment at the results which would follow if the Court be authorized to adopt such an assumption as this as a sufficient basis for declaring all goods as to which such an assumption might be predicated, contraband of commerce.

Such an assumption might be made as to countless articles of merchandise which are dealt in daily.

We do not believe that we exaggerate when we say

that a large portion of all manufactured articles and of many other articles which form the subject-matter of modern commerce are treated by the producer, in such a way as to attempt to make them seem better than they really are, and to attempt to conceal damage. *It is the great aim of commerce to make the article sold attractive to the consumer.*

There is not an article of cheap furniture that is not given a high polish for the purpose of making it look attractive.

Every article of furniture covered with veneering is thus constructed for the purpose of making it seem of greater value than it really possesses.

There is not an article of plated ware which is not thus plated for the express purpose of concealing the metal beneath and of making the article look as though it were composed of the solid metal with which it is only plated.

There is not an article of cheap clothing upon which the resources of the manufacturer's ingenuity have not been exhausted so as to make it look better than it really is in the eyes of the purchaser.

The covers of the very law books which confront us are made of paper, with the thinnest possible coating of leather on the outside in order that they may resemble solid leather a quarter of an inch in thickness.

And so the list might be indefinitely expanded.

But are these facts alone sufficient to make these articles contraband so that the Legislature may in its wisdom declare that no man who sells such articles *irrespective of his intent in so selling them and of the manner of such sale*, shall be entitled to recover their *actual—and not their fictitious*—value.

And if the answer to this be in the negative, as it surely must be, can the Courts say that because the article in question may resemble something else,

therefore, it is probable that the purchaser of such an article will endeavor himself to resell it to some other person not at its real value, but at some fictitious value, and therefore, that the Court will not enforce the contract between the original parties, which contract was made in good faith and which was not attended nor attempted to be attended with any circumstance of deception?

Such is not, we submit, the doctrine of the *Plumley* case, which, in itself a border-line case, yet did not even attempt to restrain the sale of inferior articles *as such*, but only to prevent them from being disposed of *as something else*, or in such a manner as to deceive and defraud the public.

To now extend that decision to the limits of its application in this case would be indeed to reach the result suggested by the dissenting members of this Court in the *Plumley* case:

> "I deny that a State may exclude from commerce legitimate subjects of commercial dealings because of the possibility that their appearance may deceive purchasers in regard to their qualities.
>
> "In the language of KNOWLTON, J., in the dissenting opinion below, I am not 'prepared to hold that no cloth whose fabric is so carded and spun and woven and finished as to give it the appearance of being wholly wool, when in fact it is in part cotton, can be a subject of commercial transactions, or that no jewelry which is not gold, but is made to resemble gold, and no imitations of precious stones, however desirable they may be considered by those who wish to wear them, shall be deemed articles of merchandise in regard to which Congress may make commercial regulations.'
>
> "Other illustrations will readily suggest themselves. The concession involves a serious circumscription of the realm of trade and destroys the rule by an unnecessary exception." (*Plumley vs. Massachusetts*, 155, U. S., 461, 481.)

If the contrary doctrine of the New York Court be adopted here, what a tremendously far-reaching and sweeping assertion it will be!

We earnestly and strongly submit that such is not and cannot be the law; and that in cases where fraud and deception is invoked as a basis for the police power which seeks to declare an article as contraband of commerce, there must be shown not merely such treatment of the article as makes it appear better than it really is—such treatment as will conceal damage—*but in addition, either in the particular case at bar or at the very least in the general conduct of the trade in such articles, such circumstances of attempted fraud and deception upon the public as would naturally and ordinarily lead the public to purchase the inferior article at the price of the superior article, or as would lead it to purchase one article under the supposition* (*as in the oleomargarine case*), *that an article of an entirely different nature in kind as well as in degree was being obtained*—and no such evidence here exists.

The mere concealment of defects is no sin. Life itself consists to a degree absolutely astonishing until we attempt to realize it in detail, of the concealment and attempted concealment of our own defects of every nature. It is only where this concealment is accompanied by such circumstances *as cause injury to others* that it becomes either morally or legally a crime.

And in this case no such crime has been committed and even if it be proper to indulge in hypothesis, there is not a scintilla of evidence that it probably would be committed at any time in the future.

For no reason other than a falling of the market price these defendants had been permitted, under

the guise of benefactors of the public to escape from the consequences of their own contract, and from their duty to accept goods which they concede were of the grade which they contracted for, through the operation of a statute which if intended to cover a situation like the one here presented is, we earnestly submit, wholly without the power of the legislature to enact. This result we believe to be a grave injustice.

To put in a brief manner what we have already attempted to state, we most earnestly urge upon the Court that unless there be some element of public morals or public health or public safety involved—none of which is present in this case—*every man has the right to offer for sale any article which he may possess, whether it be a defective article, whether it be an article artificially treated, whether it be made to look better than it really is or of greater value, or whether damage may have been concealed, always provided that he offers it for sale for what it really is and not for what it is not.*

If defective and damaged articles nevertheless have a market price as such, the owner of them, no matter how they have been treated, *has a right to offer them for sale at that market price* as long as he does not attempt by reason of the treatment to which they have been subjected to obtain a higher price for them than that which they are really worth, or to deceive the public as to their real nature.

Such articles are not *per se* contraband of commerce; and to hold that they were, would be to exclude from the channels of trade a proportion of the articles now dealt in which would be of enormous value and which would lead to such a disturbance of commerce as is absolutely incapable of estimation.

POINT V.

As Congress has in the exercise of its power enacted legislation as to the importation of adulterated foods pursuant to the terms of which the coffees in question were not adulterated and were properly imported into the United States, and as these coffees had been inspected and admitted into the United States by the United States officials, a State statute in effect prohibiting the delivery of such coffees in the original packages in which they were imported is unconstitutional and void.

This point is raised by the assignments of error numbered I, V, VI, VII, VIII and IX (pp. 169-173).

It is of course clear that the importation of adulterated foods is the proper subject of regulation.

It is also clear that the term "adulteration" is one of loose import and wide possible scope, needing clear definition.

This definition so far as articles imported into the United States is concerned, had been, prior to the passage of the New York statute clearly expressed by Congress in the Laws of 1890, Ch. 839, as referring to

> "Any adulterated or unwholesome food or drug, or any vinous, spiritous, or malt liquors, adulterated or mixed in with any poisonous or noxious chemical, drug or other ingredient injurious to health."

Provisions were made in this statute for the inspection of articles of food and to ascertain whether they came within the enumerated category.

The statute of the State of New York passed in

1893, under the construction given to it by the Court of Appeals of New York, attempted to *change the definition* thus given by Congress, even as applied to articles of food imported from other States.

Instead of adopting the meaning definitely fixed by congress to the effect that adulteration in order to be adulteration shall tend to affect the health of the citizen, the State Legislature attempts to give to the term a meaning entirely inconsistent, it is submitted, with that adopted by the national Legislature.

By the enactment of the United States statute Congress declared what goods of this description should be and should not be, legitimate articles of commerce so far as importation into the United States is concerned.

And it is earnestly submitted that having done this and having permitted the importation of these articles the State of New York had no power, by placing a different meaning on the term "adulteration," to nullify an act of the national Government and to prohibit the sale in the original packages of the articles thus imported.

The case is, we submit, covered by the following language of this Court:

> "Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority

> of the people of a State, represented in the State Legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create" (Chief Justice Fuller in *Leisy v. Hardin*, 135 U. S., 100, 125).

And when in addition to this we remember that the State has not merely sought to prohibit the sale of these articles lawfully imported, to its *own* citizens, *but to citizens of other States as well*, and when we remember further that the attitude of the Courts with regard to this matter has been so strict that the plaintiffs have even been prohibited from showing as fully as they sought to do the utter lack of connection of this transaction with any question over which the local Legislature had any possible jurisdiction, it will be seen, we think, that the constitutional rights of the plaintiffs-in-error have been unquestionably violated.

POINT VI.

For the foregoing reasons it is submitted that the judgment below should be reversed with costs.

DILL & BALDWIN,
Attorneys for Plaintiffs-in-Error,
27 Pine Street,
N. Y.

FREDERICK R. KELLOGG and
ARTHUR J. BALDWIN,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1908.

No. 117.

GEORGE W. CROSSMAN and HERMAN SIELCKEN,
Plaintiffs in Error,

against

THEODORE G. LURMAN, and BENJAMIN D. WILLIAMS,
Defendants in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

DILL & BALDWIN,
Solicitors for Plaintiffs in Error.

FREDERIC R. KELLOGG &
ARTHUR J. BALDWIN,
Of Counsel.

No. 18,943.

10852

Supreme Court of the United States,

No. 18648.

OCTOBER TERM, 1903.

No. 117.

GEORGE W. CROSSMAN and Herman Sielcken,
Plaintiffs-in-Error,

against

THEODORE G. LURMAN and Benjamin D. Williams,
Defendants-in-Error.

Supplemental Brief for Plaintiffs-in-Error.

We respectfully request permission to submit the following additional memorandum to the Court relating to the point raised *during the argument by the Court.*

As to Inconsistency.

It was suggested that the verdict of the jury to the effect that the coffees were adulterated was inconsistent with the concession in the answer that the goods were as called for by the contract, since the contract related to Coffee Exchange standards, the arbitrators found.

and these Coffee Exchange standards were not themselves adulterated.

In answer to this we call attention to the following point:

1. Even if this were so, the fact remains that the only question submitted to the jury was not whether the good were up to contract, *but whether they were adulterated within the meaning of the New York statute.*

2. Hence if the statute be unconstitutional in its application to this state of facts, then it seems clear that the case was tried upon the wrong theory and that the cause should be sent back for a trial in which the statute cannot be urged as a defense.

3. Moreover, it is submitted that as a matter of fact, there is no inconsistency at all, since although the Coffee Exchange standards themselves were not adulterated, yet the contract does not call for coffees which are *exactly* the same as the Exchange standards, but calls for coffees "which shall *average in grade about*" these standards.

In other words *coffees are never uniform.* Variations of many kinds occur in quality, resulting from the presence of *imperfections of various sorts.* Hence, the only way that coffee can be graded is by approximation, made by experts who take into consideration all the circumstances of the case, including imperfections such as resulted from the treatment in the case at bar.

And it is conceded that in this case precisely this course was followed.

Hence, although the jury might perfectly well have found that a part of the coffees were treated as claimed by the defendants yet that finding is

not inconsistent with the finding of the arbitrators that the goods were of the contract grades, which were only required to be *approximately* of the Exchange standards.

Respectfully submitted,

FREDERIC R. KELLOGG,
Of Counsel.